87-1223

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GER-SHEP, INC., KLP, INC., THEODORE W. SCHELL, MCMINN'S ASPHALT CO., INC., MCMINN'S ASPHALT PRODUCTS, INC. and JEFFREY G. SWEIGART,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO.
v.	:	86-00010-02
	:	86-00010-03
GER-SHEP, INC., formerly	:	86-00010-05
LANCASTER VALITE, INC.;	:	86-00010-06
KLP, INC., formerly	:	86-00010-07
BITUMINOUS APPLICATORS,	:	86-00010-08
INC.;	:	
McMINN'S ASPHALT CO., INC.	:	
McMINN'S ASPHALT PRODUCTS,	:	
INC.;	:	
THEODORE W. SCHELL; and	:	
JEFFREY G. SWEIGART,	:	
Defendants	:	

OPINION

CAHN, J. December 10, 1986

The defendants[1] were charged in a one count indictment with violating the Sherman Act, 15 U.S.C. §1, (1983), by conspiring between late 1978 and 1982 to fix prices, rig bids, and allocate territories in the bituminous

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1. The defendant, Theodore W. Schell, an individual, is the principal shareholder of Ger-Shep, Inc., formerly Lancaster Valite, Inc., and KLP, Inc., formerly Bituminous Applicators, Inc. In October of 1981 Lancaster Valite, Inc., and Bituminous Applicators, Inc., sold assets to McMinn's Asphalt Co., Inc. After the sale of these assets, Lancaster Valite, Inc., changed its name to Ger-Shep, Inc., and Bituminous Applicators, Inc., changed its name to KLP, Inc. Mr. Charles McMinn died prior to January 9, 1986, the date when the indictment in this case was returned. The government named Jeffrey G. Sweigart, individually, as a defendant in the indictment alleging that he, as an officer of McMinn's Asphalt Co., Inc., and McMinn's Asphalt Products, Inc., personally participated in the antitrust violations set forth in the indictment.

paving materials business in Lancaster County, Pennsylvania. A jury trial involving these defendants began on June 2, 1986, and on June 27, 1986, the jury found all six defendants guilty. Before the court are the post trial motions of the defendants seeking judgment of acquittal, arrest of judgment or a new trial.

1. FACTUAL CONTEXT

In order to assess the merits of defendants' post trial motions, it is necessary to set forth briefly the factual context of this litigation. In stating this factual context, I will give the government, as the verdict winner, reasonably favorable inferences from the evidence. *Burks v. United States*, 437 U.S. 1, 16 (1978). The alleged conspiracy is geographically limited to Lancaster County and chronologically limited to late 1978 to 1982, inclusive. It involves the manner in which the defendants competed to obtain contracts for bituminous paving materials with municipalities in Lancaster County and with the Department of General Services of the Commonwealth of Pennsylvania (DGS).

The linchpin of the government's case was the testimony of two co-conspirators who admitted to being involved in the alleged conspiracy and identified the six defendants as co-conspirators. The government, anticipating that the testimony of the co-conspirators would be branded by defense counsel as "tainted and polluted", also introduced extensive corroborating evidence. This corroborating evidence included government exhibits 207A (a list of the townships in Lancaster County) and 207B (a list of the boroughs in Lancaster County) which were prepared by a co-conspirator, Mr. Faylor, who was deceased at the time of trial. The initials of a conspirator were hand-written next to each municipality on the lists. According to the government Mr. Faylor placed the initials of a conspirator next to a particular municipality

to identify who was to receive the bituminous paving business of that municipality.[2]

In further corroboration of its case, the government introduced color-coded charts to illustrate for each year in question the allocation of municipal business among the conspirators. The evidence established that the color-coded charts correctly reflected bidding records of each municipality in Lancaster County. These color-coded charts buttressed the government's case because they illustrated a consistency between the testimony of the immunized co-conspirators and the allocations set forth on exhibits 207A and 207B. The bid records during the conspiratorial period for bids made by the co-conspirators to DGS also generally corroborated the testimony of the two immunized witnesses.

Finally, the government presented exhibits 220 through 228 inclusive, which compared the prices bid for similar bituminous material to municipalities and DGS in the counties surrounding Lancaster County with prices bid within Lancaster County. These exhibits demonstrated that bid prices in the surrounding counties for the same materials were substantially lower than bid prices within Lancaster County.

Both individual defendants testified in their own behalf and in behalf of their corporate principals. Both Mr. Schell and Mr. Sweigart denied involvement in any conspiratorial conduct and maintained that it was their position throughout the alleged conspiratorial period that they "agreed to disagree". The defendants also introduced expert economic testimony refuting the contention of the government that government exhibits 220 through 228, inclusive, corroborated the existence of a conspiracy within Lancaster County.

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2. The government's evidence established that other co-conspirators would submit complimentary bids over the bid price of the conspirator designated as the firm to receive the business of a particular municipality. The purported purpose of the complimentary bids was to create an appearance of legitimate bidding.

After considerable deliberation, the jury returned a guilty verdict against each defendant. The defendants raise a number of contentions in support of their post trial motions. Jeffrey G. Sweigart, McMinn's Asphalt, Inc., and McMinn's Asphalt Products, Inc., are represented by the same attorney and have incorporated in their post trial motions every contention made by Ger-Shep, Inc., formerly Lancaster Valite, Inc.; KLP, Inc., formerly Bituminous Applicators, Inc.; and Theodore W. Schell. The latter three defendants are also represented by one attorney. However, the latter defendants have not joined in all of the contentions set forth by the attorney for the former defendants.

I reject each contention made by the defendants in support of their post trial motions for the reasons set forth below and therefore will deny the defendants' motions.

II. THE GOVERNMENT ESTABLISHED A SUFFICIENT INTERSTATE COMMERCE PREDICATE

The McMinn defendants, but not the Schell defendants, maintain that the government's evidence was insufficient, as a matter of law, to establish that the activities of the defendants and their co-conspirators were in the flow of or substantially affected interstate commerce. Initially I note that the McMinn defendants made no objection to the jury instructions on this issue. The jury was instructed in accordance with concepts set forth in *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1397 (1986). There, Chief Judge Aldisert stated:

> An "in commerce" theory requires that the government prove that (1) a substantial volume of interstate commerce is involved with the challenged activity and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects . . . . An "effect on

> commerce" theory, applies to primarily intrastate activity. The government must show that (1) a substantial amount of interstate commerce was involved and (2) the challenged activity has a "not insubstantial effect" on interstate commerce.

Id. at 1192 (citations omitted). The McMinn defendants urge that the government's evidence is insufficient to meet either test.

This contention fails since the interstate commerce predicate is adequately established by proof that any of the conspirators substantially affected interstate commerce by the conspiracy to fix prices or rig bids. *See United States v. Young Brothers, Inc.*, 728 F.2d 682, 689, n.7, (5th Cir.), *cert. denied*, 105 S.Ct. 246 (1984); *United States v. Foley*, 598 F.2d 1323, 1328 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Wilshire Oil Co.*, 427 F.2d 969, 974 (10th, Cir.), *cert. denied*, 400 U.S. 829 (1970). A similar position is set forth in the American Bar Association, section of antitrust law, *Sample Jury Instructions in Criminal Antitrust Cases*, 89 (1984).

The evidence of the government established that a number of the co-conspirators and defendants purchased substantial quantities of asphaltic cement (a component used in the preparation of bituminous paving materials) from refineries in Baltimore, Maryland. The government's evidence included out of state purchases of asphaltic cement by McMinn's Asphalt Co., Inc., and McMinn's Asphalt Products, Inc., during the conspiratorial period. For example, McMinn's Asphalt Products, Inc., purchased as much as $799,000.00 worth of asphaltic cement from Blake Asphalt at refineries in Baltimore in 1982. McMinn Asphalt Co., Inc., also purchased smaller, although substantial, quantities of asphaltic cement from refineries in Baltimore.

The McMinn defendants contend, however, that the government failed to prove that the asphaltic cement

purchased from the Baltimore refineries was included in the bituminous materials sold to the Lancaster County municipalities or DGS. In my view, the jury was entitled to infer that some of the substantial purchases of asphaltic cement made by the conspirators were included in the bituminous paving material subject to the alleged bid rigging and price fixing. The jury was properly told that they were not limited to the direct evidence in the case. They were informed that in their discretion they may make reasonable inferences from the direct evidence which are warranted by the circumstances. In light of the magnitude of the interstate purchases of asphaltic cement by the conspirators, it is clear that it would be improper to take from the jury the issue of whether or not the government established an interstate commerce predicate.

The government's evidence on the interstate commerce issue was not limited to the purchase by the conspirators of asphaltic cement from Baltimore refineries. The government also showed that the defendants and their co-conspirators obtained bid bonds and performance bonds from corporate sureties whose principal office or state of incorporation was outside of Pennsylvania.[3] Thus, the record made by the government on this issue and the case law discussing the interstate commerce predicate support my decision to present the interstate commerce issue to the jury and prevent me from disturbing the jury's decision on that issue.

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3. Pennsylvania statutes require bid bonds in regard to bids over a specified dollar amount to municipalities and DGS. *See* Pa. Stat. Ann. tit. 8 §193 (Purdon Supp. 1986).

III. THE DEFENDANTS WERE PROPERLY CONVICTED OF A SINGLE CONTINUING CONSPIRACY

Both the Schell defendants and the McMinn defendants maintain that the government's case is fatally flawed by variances between the indictment and the evidence. Specifically, they claim that the government failed to prove a single continuing conspiracy as charged in the indictment and, therefore, failed to prove the indicted offense and prejudiced the defendants by introducing evidence of separate conspiracies beyond the five year statute of limitations applicable to this prosecution. *See* 18 U.S.C. §3282 (1983).

The defendants suggest that the testimony of the immunized co-conspirators precluded the government from proceeding on a continuing conspiracy theory. During cross examination these witnesses acknowledged that the agreements to fix prices, rig bids, and allocate territories were done annually prior to the bidding period and that nothing was said or done by the co-conspirators at a particular meeting to schedule meetings in subsequent years. Accordingly, the defendants urge that the government's proof showed separate conspiracies.

Although defendants are correct that the immunized witnesses did acknowledge on cross examination that the conspiratorial arrangements did not include a precise understanding that the arrangement would continue from year to year, the actions of the conspirators could well lead a jury to decide that there was an ongoing continuing conspiracy. Again, the defendants do not object to the instructions to the jury on the continuing conspiracy issue.[4] Rather, they claim that as a matter of law the evidence fails to establish the

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4. The jury instructions on this issue were based upon United States v. Smith, 789 F.2d 196 (3d Cir. 1986).

continuing conspiracy alleged in the indictment and relied upon by the government at trial.

Substantial direct and circumstantial evidence, however, supports the government's theory of continuing conspiracy. There was evidence that the co-conspirators met prior to the bidding period for the years, 1979, 1980, 1981, and 1982 at the home of Charles McMinn, a co-conspirator. Each meeting was attended by representatives of the principal bituminous paving suppliers in Lancaster County. The government's evidence also showed that Mr. Nock, who purchased a bituminous paving plant from a co-conspirator, commenced attendance shortly after the purchase.

At each meeting the co-conspirators discussed the prices of their products and allocation of territories. At each meeting they circulated lists similar to government exhibits 207A and 207B. Further, there was a pattern of allocation that continued from year to year as illustrated by the color-coded charts. Most damaging to the defendants' separate conspiracy contention is Mr. Nock's testimony that Mr. Schell informed him that the bituminous paving business of certain townships went with the plant he purchased.

I hold that even though the immunized witnesses testified that there was no conversation at any conspiratorial meeting pertaining to scheduling meetings in ensuing years, it is clear that the jury was warranted in finding a continuing conspiracy because of the continuing conduct of the conspirators. The evidence in this case did not show criminal conduct of the type that is once and done. In this case, the conspiracy made sense only if it continued from year to year.

The record established that the capital cost of bituminous paving plants was substantial and that the conspirators, at least circumstantially, had expectations that their agreement was ongoing. An immunized witness, Burkholder, testified that the conspirators were concerned about low prices and cutthroat competition.

The purpose of their meetings was to raise prices and eliminate cutthroat competition, and there is no evidence, either direct or inferential, that their motive was limited to a particular year. On the contrary, all of the evidence suggests that it was continuing. The conclusory remark of Mr. Burkholder that there was no arrangement at a particular yearly meeting to meet in a subsequent year is insufficient, in light of all the other evidence in the case, for me to take that issue from the jury.

IV. THE COURT DID NOT ERR IN ADMITTING GOVERNMENT EXHIBITS 207A AND 207B

Government exhibits 207A and 207B—the lists of townships and boroughs initialed by Mr. Faylor, the president of H.R. Miller, Inc., and an alleged co-conspirator—were properly admitted. Although Mr. Faylor was deceased at the time of trial, his secretary authenticated the list by identifying Mr. Faylor's handwriting and testifying that Mr. Faylor brought the list back from a meeting. She did not, however, know when the list was initialed, the purpose of the initials, or the manner in which Mr. Faylor used the list. The McMinn defendants objected to the admission of these exhibits and urge that the evidentiary ruling was reversible error. They maintain that the initials on the typewritten list are out-of-court assertions by Mr. Faylor and should be barred as inadmissible hearsay.

The McMinn defendants are incorrect in their contention. It is clear that the documents were properly authenticated. The testimony of Mr. Faylor's secretary combined with the testimony of Mr. Burkholder (*see* Tr. Vol. 4 pages 43-44 and 61-63) establish that the list is what it purports to be and is the document used by the co-conspirators and circulated at one of their meetings.[5]

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5. In Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 927 (3d Cir. 1986), the court noted that circumstantial

The consistency between the list and the bidding patterns of the co-conspirators further supports the authenticity of the document.

It is also clear that the document is not hearsay because Fed. R. of Evid. 801(d)(2)(E) defines a statement by a co-conspirator as not hearsay if it is made during the conspiracy and in furtherance of it. There is an additional requirement that before co-conspirators' statements are admissible, independent evidence of a particular defendant's participation in the conspiracy must be established by the government by a preponderance of the evidence. The trial judge makes this determination outside of the presence of the jury. In this case, I found, by a preponderance of the evidence, that there was sufficient independent evidence of each defendants' involvement in the conspiracy to permit the admission of co-conspirators' statements. *See United States v. Ammar*, 714 F.2d 238, 250 (3d Cir.), *cert. denied*, 464 U.S. 946 (1983).

In addition, even if the document is classified as hearsay through a rejection of the application of Rule 801(d)(2)(E), Rule 803(6), the business records exception, allows hearsay set forth in a data compilation of events made at or near the time by a person with knowledge, if kept in the course of a regularly conducted business activity. Here, the prerequisites of Rule 803(6) are met because there is evidence that Faylor consistently made use of these lists or similar lists and that he made the data compilation and used it in his business activities. *See In Re Japanese Electronic Products*, 723 F.2d 238, 288-89 (3d Cir. 1983) (holding that the regular practice requirement [of 803(6)] should be generously construed to favor admission). It should be noted that the person making the compilation need not testify

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FOOTNOTE *(Continued)*

evidence is sufficient to authenticate a document and that the burden on the proponent is slight. Clearly, this standard has been satisfied in regard to Exhibits 207A and 207B.

if the custodian of the records supplies the necessary predicate. The testimony of the record keeper (Faylor's secretary) and the testimony of the immunized witnesses provide the foundation for the admission of these exhibits as business records.

V. THE COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING THE "OUT-OF-COUNTY" EVIDENCE

Both the McMinn defendants and the Schell defendants contend that government exhibits 220 through 228, inclusive, relating to price comparisons between Lancaster County and surrounding counties were improperly admitted. They also argue that it was reversible error to permit Mr. Carr, an official of an out-of-county competitor, to describe conversations he had with a co-conspirator about the entry of Carr's firm into the Lancaster County municipal market for bituminous paving materials.

Defendants urge that the court erred in balancing the relevant probative value of government exhibits 220 through 228, inclusive, against possible prejudice from use of those exhibits. The exhibits illustrated that bid prices for similar bituminous paving materials in the surrounding counties were lower than the defendants' bids in Lancaster County. In some cases the exhibits showed that the co-conspirators' prices were higher within Lancaster County than without the county. In support of their contentions, the defendants point to the opinion testimony of their economic experts that the evidence does not purport to establish what the government maintains.

The government argues, however, that its exhibits 220 through 228, inclusive, do in fact corroborate the testimony of the immunized witnesses as to the existence of the conspiracy. The government admits that these exhibits are by themselves insufficient to show the

existence of the alleged conspiracy but urges that it was proper to admit the evidence as corroboration. I hold that the government's position is correct. It is for the jury to assess the evidence. While it is true that factors (other than a price fixing conspiracy) might explain the pricing differentials illustrated by exhibits 220 through 228, inclusive, that possibility does not render the exhibits inadmissible. Certainly, the exhibits have a valid probative purpose for corroboration. It is at least arguable that, if there was a conspiracy limited to Lancaster County, one would expect that the prices in the surrounding counties would be lower. This is what these exhibits illustrated and therefore the exhibits are relevant, at least for corroborative purposes.

Moreover, the defendants have not established that the exhibits are in any way unfairly prejudicial. Of course, the exhibits corroborate the immunized witnesses and to this extent adversely affect the defendants' position in this litigation. That, however, is not tantamount to the exhibits being prejudicial. The exhibits were not inflammatory, nor did the prosecution present the exhibits in an unfair manner. In short, there was nothing to balance because the exhibits were relevant and there was no unfair prejudice flowing from the introduction of the exhibits. The defendants suggest that the jury may have been confused by the exhibits; however, the defendants point to no confusion other than the testimony of their experts that the exhibits by themselves do not establish conspiratorial conduct.

The defendants further contend that the confrontation requirement of the Constitution has somehow been violated by the introduction of these exhibits. The exhibits were compiled by a paralegal in the office of the prosecutor. She testified as to the manner of collecting the data and collating it in the exhibits. The supporting data which she summarized in the exhibits was made available to the defense. There is no confrontation problem. *See United States v. Colyer*, 571 F.2d 941 (5th

Cir.), *cert. denied*, 439 U.S. 933 (1978) (admission of credit card tickets did not deprive defendant of right to confront witnesses from the businesses where the tickets made).

The defendants argue that they had insufficient time to prepare a refutation for the exhibit. At first, the case was continued because of the death of the father of one of the attorneys involved for the Schell defendants. His associate, who was extensively involved in the pretrial proceedings and attended the jury trial, had an adequate amount of time to review these exhibits. Furthermore, the pricing information set forth in the exhibits included data which was available to the defendants. Also, Mr. Schell and Mr. Sweigart had access to information about the cost factors involving bituminous paving material.

Thus, the defendants were not prejudiced by an inability to refute the exhibits. To the extent they thought the exhibits did not corroborate the immunized witnesses, they had ample time to review the data with their clients and with their experts. Finally, I repeatedly offered the defendants a hiatus in the trial in order for them to pursue whatever avenues of investigation they found appropriate in regard to these exhibits. *See* Tr. Vol. 1 at 176-183, Tr. Vol. 9 at 159-161. These offers were not accepted.

Both of these defendants also urge that it was reversible error to admit the testimony of James Carr. Mr. Carr is an official with General Crushed Stone Company, a bituminous paving producer in Berks County. The defendants claim that the Carr testimony involves criminal wrongdoing not alleged in the indictment and that therefore there is a fatal variance between the proof and the indictment. In addition, the Schell defendants claim that the conversations Mr. Carr had with co-conspirators were inadmissible because they took place after the sale of Schell assets to the McMinn Corporations.

I reject all of these contentions. Carr testified that pressure was placed upon him at these meetings by Burkholder, McMinn and Sweigart in regard to his attempts to compete for municipal business in Lancaster County and that he was told "we don't need low prices." It is not at variance with the indictment to admit this evidence because for a price fixing and bid rigging conspiracy to be effective within Lancaster County, it is important that competitors, not within the conspiracy, be discouraged from competing within the county. The attempt by the conspirators to obtain cooperation from Carr is probative of the existence of the conspiracy as testified to by the immunized witnesses and does not introduce acts of wrongdoing not charged within the indictment. The meeting with Carr took place within Lancaster County and related to Lancaster County business.

In regard to Mr. Schell's contention that he was not involved in the Carr conversations, it must be noted that one conspirator is responsible for the actions of the other co-conspirators even if he does not engage in them personally and even if he had no knowledge that the other conspirators were doing what they did. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947). The acts of the co-conspirators in meeting with Carr were in furtherance of the alleged conspiracy and occurred during the existence of the conspiracy as alleged in the indictment. Furthermore, there was testimony from the immunized witnesses about the co-conspirators discussing out-of-county competitors. Mr. Nock testified that Mr. Schell complained about that problem. Moreover, Mr. Schell does not take the position he had withdrawn from the conspiracy at the time of the Carr conversations. Schell's position is that he never was a conspirator.

VI. THE COURT DID NOT ACT IN A PREJUCICIAL MANNER TOWARD ANY DEFENDANT

The Schell defendants allege that I was prejudiced in favor of the government. First, they assert that I conveyed to the jury my opinion that the immunized witnesses were truthful. During the examination of Burkholder by the prosecution, counsel for the Schell defendants informed the court that he did not hear the witness's answer. The witness had answered "Obviously, yes." I replied to counsel "Obviously, yes, he was mistaken." (Tr. Vol. 5, p. 54) The defendants suggest that by adding the words "he was mistaken" I excluded the possibility that the witness fabricated a lie and thereby conveyed to the jury a feeling on my part that Burkholder was telling the truth. A more complete quotation from the record is necessary to understand what took place.

> Q. I have handed to Mr. Buckholder what's in evidence as government exhibit GE54-3A. Now Mr. Burkholder, these are the township minutes of Upper Leacock Township dated July 5, 1979. There is a bid report in here for ID2 for paving Musser School Road, School Drive and Hickory Lane. Is that correct?
>
> A. Yes.
>
> Q. Who are the bidders on that contract?
>
> A. Burkholder Paving, Lancaster Valite.
>
> Q. And who does the township records indicate won that bid that year?
>
> A. Burkholder Paving.
>
> Q. Would you be mistaken sir—
>
> Mr. Sprague: I object to that, Your Honor. For the Government to try to rehabilitate this witness in terms of what he just testified—

The Court: Overruled. The Federal Rules specifically imply you may impeach your own witness. Overruled.

Mr. Sprague: I submit there's got to be some plea here first; you just don't take a document and then go to correct him like that.

The Court: Overruled. He may impeach his own witness.

Q. Mr. Burkholder, does that refresh your recollection that the conversation you had with Mr. Schell about Upper Leacock in 1979 was not in respect to you giving him a complementary [sic] bid?

A. Obviously, yes.

Q. Do you recall—

Mr. Sprague: I did not hear that answer, Your Honor.

The Court: Obviously, yes, he was mistaken. (Vol. 5, pp. 53-54)

Reading the record in context, it is clear that my use of the word "mistaken" was taken from the question of the prosecutor. It was not an assessment of the court as to the credibility of the witness and it did not convey that type of impression to the jury. Furthermore, when counsel for the defendant raised this problem with the court at the close of proceedings on that day, arrangements were made to give a curative instruction to the jury on that point.[6]

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6. As a curative instruction I told the jury, *inter alia*, "[w]hether he was mistaken, his motives in doing what he did and all that kind of thing, are strictly for you, and I'm not trying to send any hints for you that I believe or disbelieve any particluar witness." Tr. Vol. 6 pp. 12-13.

On page 32 of the Schell defendants' brief, it suggested that I conveyed to the jury my finding that the immunized witnesses "were essentially trying to be truthful". I certainly made that finding; however, it was not in the presence of the jury. It was at a stage in the proceedings when I was required to make a finding outside of the presence of the jury as to whether or not there was independent evidence of the existence of a conspiracy to support the introduction of co-conspirators' statements pursuant to Fed. R. of Evid. 801(d)(2)(E). It is incumbent upon the court to make a finding, one way or the other, on this issue outside of the presence of the jury and my finding in regard to the immunized witness's credibility was never conveyed to the jury.

The defendants also take issue with my question to Mr. Burkholder, outside of the presence of the jury, concerning whether or not he discussed his testimony with anyone from the defense side of this case. Mr. Burkholder replied "no". I made this inquiry because it was relevant to a determination of whether or not I should permit the government to ask leading questions of the witness on redirect examination. I had perceived a change in the tenor of the witness's testimony. It was for that reason I permitted leading questions. I think my inquiry was appropriate under the circumstances and in no way prejudiced any defendant before the jury.

My charge to the jury, after covering the complex legal issues involved in this case, suggested that the jury focus its attention upon certain key disputes. One of the key disputes was the credibility of the immunized witnesses versus the credibility of the individual defendants who denied any conspiratorial conduct. I instructed the jury:

> "So while I read a lot of words to you on this point, the controversy is quite clear cut for you. Is the version of Nock and Burkholder correct? If it is,

> that would suggest a guilty verdict. If it's not, that would suggest a not guilty verdict." (Tr. Vol. 22, pp. 35 and 36).

The Schell defendants took specific exception to this instruction. I gave supplemental instructions in response to this specific exception wherein I stated:

> What I said was that the Nock and Burkholder version do suggest some points in favor of the government, but they also suggest some points in favor of the defendants, and you have to evaluate the entire testimony as well as the corroborative testimony. (Tr. Vol. 22, pp. 72 and 73).

In their post trial motions, the Schell defendants argue that the instruction and the supplemental instruction were defective because I did not inform the jury that they could find that the immunized witnesses were truthful and still find for the defendants. I reject this contention. The charge taken as a whole was adequate. The supplemental instruction was sufficient to clear up any misunderstanding and the Schell defendants, although given the opportunity, never advised me of their dissatisfaction with the supplemental instruction.

The defendants contend that it was error for the court to ask Burkholder to explain to the jury the mechanics of complimentary bids. This was not error. It was a discharge of my obligation to make sure that the jury understood the factual underpinnings of the controversy. *See United States v. Stirone*, 311 F.2d 277, 280-81 (3d Cir. 1962), *cert. denied*, 372 U.S. 935 (1963).

The other instances referred to by the Schell defendants in regard to the manner in which the court resolved objections and interjected questions border on the frivolous and will not be discussed further. The record refutes the contentions of the Schell defendants that the court acted as a back-up to the government in presenting evidence to the jury.

The Schell defendants object to a humorous remark the court directed to the prosecutor during his cross examination of Mr. Sweigart. Mr. Sweigart testified to his age on direct examination. During the cross examination the prosecutor in his questioning incorrectly referred to Mr. Sweigart's age as being more advanced than Sweigart had said. I asked the prosecuting cross-examiner "Are you suggesting that he's aging under your cross examination?" (Tr. Vol. 18, p. 153) No objection was made at that time. A few moments later, *sua sponte*, I made the following remarks to the jury:

> . . .[Members of the jury, and before I forget it, it's not good form for me to say something funny. And I just don't want you to get the wrong impression. The case is very serious to both sides. I think you know that from the effort that's forthcoming from both sides. And the penalties for violation of this type of offense are serious and severe. So it's really not a funny case and I probably shouldn't have made a funny remark, so just strike that from your memory. (Tr. Vol. 18, p. 157).

At the end of each trial day, I gave counsel an opportunity to place statements on the record and call to my attention any problems that needed to be resolved. At the end of the day counsel for the Schell defendants took exception to my humorous remark. This exception is meritless. The remark did not have any adverse impact on the Schell defendants. In fact, I gave the cautionary instruction to the jury because of my impression that the humorous remark was at the expense of the prosecuting cross-examiner. In any event, I emphasized to the jury the seriousness of the case and that it was inappropriate for me to inject humor in the proceedings. The Schell defendants were not prejudiced by this incident.

The other objections made by the Schell defendants pertaining to the manner in which the court conducted the trial do not deserve detailed responses. On occasion

I rephrased questions posed by both the prosecuting attorneys and the defense attorneys in order to resolve, in an expeditious way, objections raised by opposing counsel. In my view, this was necessary to keep a lengthy and tedious trial moving. There was a danger in this proceeding that the jury would lose its concentration because of the presentation of extensive details by the prosecution as well as the defense. It is better practice, in my view, to rule quickly on objections and where necessary rephrase questions for the attorneys in order to expedite the trial. Furthermore, the extent to which I rephrased questions for the attorneys was much more limited than suggested by the Schell defendants in their post trial brief. My general practice is to let the attorneys try their own cases with the court staying out of the fray as much as possible. The Schell defendants have selected isolated instances to support their argument. The record will refute their contention that the Court took the trial away from the attorneys and conducted it himself.

Finally, it was not error for me to tell an immunized witness, Mr. Nock, that he should be specific as possible in relating co-conspirator conversations but that, if he can't remember everything verbatim, he should give us his best recollection. This admonition was given to the witness in order to satisfy the concern of defense counsel that the immunized witnesses be as precise as possible when paraphrasing co-conspirator conversations. The instruction to the witness was not error; it did not take the trial away from the attorneys; and it was not prejudicial to any party.

An appropriate order will be entered.

BY THE COURT:

/s/ EDWARD N. CAHN
Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO.
v.	:	86-00010-02
	:	86-00010-03
GER-SHEP, INC., formerly	:	86-00010-05
LANCASTER VALITE, INC.;	:	86-00010-06
KLP, INC., formerly	:	86-00010-07
BITUMINOUS APPLICATORS,	:	86-00010-08
INC.;	:	
McMINN'S ASPHALT CO., INC.:	:	
McMINN'S ASPHALT PRODUCTS,	:	
INC.;	:	
THEODORE W. SCHELL; and	:	
JEFFREY G. SWEIGART,	:	
Defendants	:	

ORDER

AND NOW, this 10th day of December, 1986, IT IS ORDERED that all of the post trial motions of defendants are DENIED.

IT IS FURTHER ORDERED that the defendants are directed to report for sentencing on Wednesday, December 31, 1986, at 10:00 A.M. in Courtroom 2, Old Lehigh County Courthouse, 501 Hamilton Street, Allentown, Pennsylvania.

BY THE COURT:

/s/ EDWARD N. CAHN
Edward N. Cahn, J.